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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-477

RICHARD E. GERSTEIN, PETITIONER

v.

ROBERT PUGH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States is filing a brief in this case as *amicus curiae* at the request of the Court.[1] The issue in which the United States has an interest involves the question whether a defendant in custody and awaiting trial on criminal charges pursuant to an information filed by the prosecutor has a constitutional right to a preliminary hearing.[2] The court of appeals

[1] Letter to the Solicitor General from the Clerk of the Court dated May 28, 1974.

[2] The other question involved in this case is whether the district court properly exercised jurisdiction to consider respondents' claims in this class action suit for injunctive and declaratory relief, or whether it should have abstained from exercising jurisdiction for reasons of state-federal comity. We do not discuss that question in this brief because

held that the failure to afford such a hearing before a neutral and detached judicial officer deprives such a defendant of due process of law. Its decision also implies that the detention of the accused under such circumstances constitutes an unreasonable seizure of his person in violation of the Fourth Amendment.

While the decision of the court of appeals was rendered in the context of an attack on the system for initiation and maintenance of prosecutions in the State of Florida, the court's constitutional ruling necessarily has application to the criminal justice system of every jurisdiction in the United States, including the federal system.[3] It would follow from adoption of the court of appeals' ruling that Rule 5(c) of the Federal Rules of Criminal Procedure is unconstitutional insofar as that rule provides that "[a] defendant is entitled to a preliminary examination[4] * * * [which] shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody * * *; *provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set*

its resolution will have little if any impact on the administration of criminal justice in federal prosecutions.

[3] In the federal system and in the Superior Court of the District of Columbia, only misdemeanor prosecutions would be effected, since all felonies necessarily are prosecuted by grand jury indictment. U.S. Constitution, Fifth Amendment. In many States, however, both felony and misdemeanor prosecutions are initiated by information.

[4] Throughout this brief, the terms "preliminary examination" and "preliminary hearing" are used interchangeably.

for the preliminary examination" (emphasis supplied). The Federal Magistrates Act would be similarly affected. See 18 U.S.C. 3060(e).[5]

From a pragmatic standpoint, invalidation of the portion of Rule 5(c) set forth above, and the requirement of preliminary hearings in all cases initiated by information, would have relatively little adverse impact on the general federal criminal justice system. In felony cases, defendants in custody will either receive a preliminary hearing or be indicted by a grand jury, so that detention during the period from arrest to trial cannot be based solely upon the decision of the prosecutor to prefer charges.[6] While there are a substantial and growing number of federal misdemeanor prosecutions, the vast bulk of which are proceeded on by information rather than indictment,[7] the nature of the offenses (few of which involve

[5] Although not directly addressing the matter, the reasoning of the court of appeals also calls in question the constitutionality of that portion of Rule 9(a) of the Federal Rules of Criminal Procedure which provides that "[u]pon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information * * *," since the rule apparently mandates the issuance of a bench warrant without any review by the court of the probable cause underlying the prosecutor's charging decision.

[6] In more than 10% of felony cases during 1972, indictment was waived by the defendant. 1972 Annual Report of the Director, Administrative Office of the United States Courts II–52. In such instances, presumably, the waiver could properly be viewed as encompassing a waiver of the right, if any such right were recognized in this case, to have the grand jury's probable-cause-determining function performed by a magistrate.

[7] In fiscal year 1972, there were 10,268 misdemeanor cases commenced by information in the federal district courts. 1972

crimes of violence) and of the defendants makes it relatively rare that misdemeanor defendants are held in custody awaiting trial. Thus, the burden of holding preliminary hearings (or securing indictments) in this limited category of cases would not seriously impair the efficient overall performance of the federal criminal justice system.

There would, however, be a serious impact on the functioning of the local criminal justice system in the District of Columbia. Information supplied by the United States Attorney[5] shows that there are currently approximately 6,500 misdemeanor informations filed annually in the Superior Court of the District of Columbia and that defendants are unable to make bond and are therefore incarcerated pending trial in 15–20% of those cases (many of which do involve crimes of violence). Thus, if this Court adopts the holding of the court of appeals, an already overburdened court system would be required to hold between 1,000 and 1,300 additional preliminary hearings per year.

QUESTION PRESENTED

Whether a defendant in custody and awaiting trial on criminal charges pursuant to an information filed by the prosecutor has a constitutional right to a preliminary hearing.

Annual Report of the Director, Administrative Office of the United States Courts, *supra*, at II–52.

[5] The United States Attorney for the District of Columbia serves also in the capacity of local prosecutor for all criminal offenses (with certain exceptions, not relevant here, relating primarily to municipal and police regulations) which are prosecuted pursuant to the District of Columbia Code in the Superior Court of the District of Columbia. See 23 D.C. Code 101.

FEDERAL STATUTE AND RULES INVOLVED

18 U.S.C. 3060 provides in pertinent part:

> (a) Except as otherwise provided by this section, a preliminary examination shall be held within the time set by the judge or magistrate pursuant to subsection (b) of this section, to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it.
>
> * * * * *
>
> (d) Except as provided by subsection (e) of this section, an arrested person who has not been accorded the preliminary examination required by subsection (a) within the period of time fixed by the judge or magistrate in compliance with subsections (b) and (c), shall be discharged from custody or from the requirement of bail or any other condition of release, without prejudice, however, to the institution of further criminal proceedings against him upon the charge upon which he was arrested.
>
> (e) No preliminary examination in compliance with subsection (a) of this section shall be required to be accorded an arrested person, nor shall such arrested person be discharged from custody or from the requirement of bail or any other condition of release pursuant to subsection (d), if at any time subsequent to the initial appearance of such person before a judge or magistrate and prior to the date fixed for the preliminary examination pursuant to subsections (b) and (c) an indictment is returned or, in appropriate cases, an information is filed against such person in a court of the United States.
>
> * * * * *

Rule 5 of the Federal Rules of Criminal Procedure provides in pertinent part:

INITIAL APPEARANCE BEFORE THE MAGISTRATE

(a) *In General.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

* * * * *

(c) *Offenses Not Triable by the United States Magistrate.* If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement

made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

559-086—74——2

Rule 5.1 of the Federal Rules of Criminal Procedure provides in pertinent part:

PRELIMINARY EXAMINATION

(a) *Probable Cause Finding.* If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

(b) *Discharge of Defendant.* If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

* * * * *

Rule 9 of the Federal Rules of Criminal Procedure provides in pertinent part:

WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

(a) *Issuance.* Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.

* * * * *

STATEMENT

On March 22, 1971, respondents Pugh and Henderson, subsequently joined by intervening respondents Turner and Faulk, filed a class action suit in the United States District Court for the Southern District of Florida against various Dade County, Florida officials, including petitioner Gerstein, the Dade County State Attorney. At the time the suit was filed, respondents Pugh and Henderson were incarcerated in the Dade County Jail upon informations filed by the State Attorney, as permitted by Article I, Section 15(a) of the Florida Constitution. Respondents sought an injunction and a declaration that a preliminary hearing before a committing magistrate on probable cause after arrest and before trial was compelled by the Fourth Amendment and by the Due Process Clause of the Fourteenth Amendment.

On October 12, 1971, the district court issued an opinion and judgment declaring unconstitutional the Florida practice of denying a judicial determination of probable cause to persons proceeded against by in-

formation and concluding that arrested persons, whether or not released on bond, have a constitutional right to a judicial hearing on the question of probable cause (Pet. App. 29–46; 332 F. Supp. 1107). The court directed that a plan for the implementation of its order be submitted (Pet. App. 46; 332 F. Supp. at 1115–1116). Pursuant to the court's order, E. Wilson Purdy, the Director of Public Safety of Dade County, submitted a plan, adopted by the court with modifications on January 25, 1972 (Pet. App. 47–54; 336 F. Supp. 490), which provided for preliminary hearings within four days of initial appearance for those unable to post bond and within ten days for all other defendants (Pet. App. 49; 336 F. Supp. at 491). Petitioner Gerstein appealed to the Fifth Circuit Court of Appeals, and that court stayed the Purdy Plan pending appeal.

Shortly thereafter, the judges of Dade County implemented their own plan for preliminary hearings, under which the State Attorney retained the power, given him by Florida law, to bypass the preliminary hearing by filing an information. The court of appeals thereupon lifted its stay order and directed the district court to make specific findings of fact on the constitutional deficiencies, if any, of the plan implemented by the Dade County judges. Meanwhile, the Supreme Court of Florida amended its Rules of Criminal Procedure to provide, *inter alia,* for preliminary hearings. The amended rules, however, provide that preliminary hearings are available only to those charged with felonies and that persons proceeded against by information filed by the State Attorney are

not entitled to such hearings. Florida Rules of Criminal Procedure, Rule 3.131(a).[9]

On remand from the court of appeals, the district court concluded that the practice that permits the State Attorney to obviate the requirement of a preliminary hearing by filing an information does not afford due process of law and violates the Fourth Amendment; that providing different time limits for preliminary hearings for those charged with capital offenses and offenses punishable by life imprisonment from those set in other cases violates both due process and equal protection; and that the authorization for the State Attorney to refile an information if a defendant is discharged by a judicial officer is a violation of the Fourth and Fourteenth Amendments (Pet. App. 55–69; 355 F. Supp. 1286). The court also concluded that the denial of preliminary hearings to misdemeanants violates the Fourth Amendment and both the due process and equal protection clauses of the Fourteenth Amendment (Pet. App. 60–65; 355 F. Supp. at 1289–1291). Accordingly, it required a judicial probable cause determination for all misdemeanants who face potential imprisonment, but not those charged with violations that carry no possible prison term (Pet. App. 61–62; 355 F. Supp. at 1290).

On August 15, 1973, the court of appeals affirmed the judgment of the district court in substantial part (Pet. App. 1–28; 483 F. 2d 778). The court held that due process requires a preliminary hearing on prob-

[9] The Rule provides, in pertinent part: "A defendant, unless charged in an information or indictment, has the right to a preliminary hearing on any felony charge against him."

able cause before a judicial officer "when the state attorney prosecutes presently-confined arrestees by filing an information" (Pet. App. 10; 483 F. 2d at 783). It also concluded that "[n]o sufficient justification exists for disallowing preliminary hearings for misdemeanants" (Pet. App. 23; 483 F. 2d at 788). Finally, the court vacated that portion of the district court's judgment relating to two specific sanctions imposed,[19] because it would "not presume that such onerous sanctions" were any longer necessary to insure compliance with the amended Florida Rules of Criminal Procedure as modified by the court's opinion (Pet. App. 28; 483 F. 2d at 790).

This Court granted certiorari on December 3, 1973 (414 U.S. 1062); briefs were filed, and the Court heard argument on March 25, 1974. On April 15, 1974, the Court ordered that the case be restored to the calendar for reargument, and on May 28, 1974, the Court invited the United States and the Attorneys General of the fifty States to file briefs as *amici curiae*.

SUMMARY OF ARGUMENT

1. Our analysis begins with the contention that in criminal cases that may constitutionally be commenced by an information filed by the prosecutor, due process does not require an opportunity for pre-trial

[19] The sanctions were: (1) after a magistrate's finding of no probable cause, the prosecutor only could proceed by grand jury indictment; and (2) if no preliminary hearing were provided within the prescribed time limits, the charges would be withdrawn and the defendant released from custody. The charges could be refiled, but, if twice withdrawn, the prosecutor could only proceed by grand jury indictment. See Pet. App. 51, 53; 336 F. Supp. at 492–493; Pet. App. 27–28; 483 F. 2d at 790.

review of the charging decision by a judicial officer. While the court of appeals focused its concern not on the right of the prosecutor to file charges but on the deprivation of liberty entailed in pre-trial detention, the nature of the remedy selected by the court (a preliminary hearing) undermines this traditional premise of our criminal justice system.

It is established that due process does not require all prosecutions to be initiated by grand jury indictment and that, where authorized by law, an information filed by the prosecutor is a constitutionally permissible method by which to bring a criminal charge. *Hurtado* v. *California*, 110 U.S. 516. Moreover, a prosecutor's information, if valid on its face, is enough to call for a trial of the case on the merits. See *Costello* v. *United States*, 350 U.S. 359, 363. Finally, this Court has consistently held that no preliminary hearing is required by the Constitution prior to the formal accusation by the prosecutor's information. *Lem Woon* v. *Oregon*, 229 U.S. 586; *Ocampo* v. *United States*, 234 U.S. 91; *Beck* v. *Washington*, 369 U.S. 541.

An underlying assumption and natural consequence of these decisions is that, if no hearing is required before the filing of the formal charge (either indictment or information), none can be required after the formal charge is brought, because, historically, the hearing was "preliminary" to the filing of such charges in a court of competent trial jurisdiction. Its limited purpose was to allow the magistrate to determine whether there was then sufficient evidence upon a complaint by a citizen or police official to "bind over" a suspect for later stages of the criminal process pending deter-

mination of whether to file the formal charge. No legitimate purpose is served by a preliminary hearing after the charge has been filed, because the information or indictment itself establishes that the evidence is sufficient to require the suspect to answer the charges against him at trial. See *Costello* v. *United States, supra; Albrecht* v. *United States,* 273 U.S. 1. Moreover, the Court's opinion in *Ocampo* not only supports the proposition that no preliminary hearing need precede the trial, but it also makes clear that the information filed by the prosecutor is sufficient to require the court to issue a warrant to bring the accused before it for trial. See also Fed. R. Crim. P. 9(a); *Albrecht* v. *United States, supra;* cf. *Ex parte United States,* 287 U.S. 241, 249–250.

Conferral of the charging power on the prosecutor, free of pre-trial judicial supervision, is neither unfair nor inconsistent with recent decisions of this Court. Both *Coolidge* v. *New Hampshire,* 403 U.S. 443, and *Shadwick* v. *City of Tampa,* 407 U.S. 345, were concerned with the kind of probable cause determination traditionally made by magistrates preliminary to the issuance of warrants. While there are historical and practical reasons for a magisterial determination of probable cause for a warrant in the investigative phase of a criminal case, assessment of the evidence for sufficiency to support the bringing of formal criminal charges traditionally has been a prosecutorial function (or a function of the prosecutor together with a grand jury, but never of the judiciary).

Nor does *Morrissey* v. *Brewer,* 408 U.S. 471, require a preliminary hearing in the situation

presented here. That case requires only that someone other than the parole officer who has recommended revocation make a preliminary evaluation that there is probable cause to believe that conditions of parole have been violated. In the criminal justice system, this type of preliminary evaluation properly is made by the prosecutor, who reviews the decision of the arresting officer before deciding to submit the case to the grand jury for its consideration or before filing an information. Moreover, in making the decision whether to prefer charges, the prosecutor has both the duty and the natural incentive to assess fairly the relevant factors—the strength of the evidence, the likelihood of conviction and the efficient utilization of limited prosecutorial resources. See ABA Standards for Criminal Justice, *The Prosecution Function,* §§ 3.4(a), 3.9(b) (Approved Draft, 1971).

Even if preliminary hearings are sometimes to be required in cases initiated by information, it is not unconstitutional to differentiate between felony and misdemeanor cases in this regard. *Argersinger* v. *Hamlin,* 407 U.S. 25, does not support a contrary conclusion. *Argersinger* was concerned with the requirements of the Sixth Amendment, which by its terms applies to "all criminal prosecutions." The due process right to a preliminary hearing, on the other hand, necessarily relates to the method by which charges are brought, and the Fifth Amendment itself distinguishes between felony and misdemeanor prosecutions in that regard. Moreover, in considering misdemeanor cases (four to five million annually in the state courts, ten thousand

in the federal courts and 6,500 in the Superior Court of the District of Columbia), it is particularly appropriate to balance the supposed benefit to the accused from a preliminary hearing against the strain on the criminal justice system that will be imposed by diverting overburdened judges, court personnel, lawyers and facilities from the task of speedily disposing of cases at trial. In the case of misdemeanors at least, the due process balance should be struck on the side of speedy trial rather than preliminary hearing.

2. Because the court of appeals' holding was expressly limited to "presently-confined arrestees" (Pet. App. 10; 483 F. 2d at 783), it is clear that the court's concern was with incarceration of defendants pending trial. That being so, the court selected a remedy (the preliminary hearing) which is functionally and historically inappropriate to meet the problem. To the extent that possibly unjustified pre-trial incarceration was its concern, the focus of the court's opinion should have been not on preliminary hearings but on the Florida bail procedures.

Due process is afforded, we submit, when relevant matters concerning the strength of the prosecutor's case can be considered in the course of the bail proceedings. In the federal system and in the Superior Court of the District of Columbia, "the nature and circumstances of the offense charged" and "the weight of the evidence against the accused" are factors considered by the judicial officer in determining appropriate conditions of release pending trial. 18 U.S.C. 3146(b); 23 D.C. Code 1321(b). Since these are the very factors that respondents would have the

judicial officer consider at a preliminary hearing, the bail hearing, though a less formal proceeding, is the functional equivalent of the hearing that respondents seek as a constitutional right. In a weak case, the consideration of these factors nearly always would lead to an accused's release on bond (but, of course, not to dismissal of the charges against him). In the rare case where there appears to be both a weak government case and a strong likelihood of flight before trial, the court, in the exercise of its discretion to control its calendar, may schedule the trial immediately or on an expedited basis. The power of the court in matters of bail and with respect to its calendar thus affords ample judicial control over the problem of potentially unjustified pre-trial incarceration to satisfy the requirements of due process.

3. Assuming *arguendo* that the bail system is not an adequate check on unwarranted detention of defendants pending trial and that some form of preliminary probable cause determination by a judicial officer is constitutionally required, it does not follow that due process requires adoption of a formal preliminary hearing as the vehicle for this determination.

The magistrate's assessment of probable cause is not inherently the kind of inquiry that requires live witnesses and cross-examination, as is evidenced by the fact that search and arrest warrants are authorized on the basis of *ex parte* applications supported by affidavits (which may be based in whole or in part on hearsay evidence). Due process would be satisfied by a similar procedure for the determination of probable cause after arrest and the filing of an information.

Any probable cause determination which is required could be fairly and efficiently made at the bail hearing, which is much less formal than the preliminary hearing sought by respondents. The determination of probable cause, like bail and sentencing decisions, can be made on the basis of information proffered in open court by counsel (with the judge or magistrate retaining power, in the occasional case where he considers it necessary, to require live witnesses).

Recent due process cases of this Court relied upon by the court of appeals and by respondents [11] do not require a more formalized procedure to determine probable cause. Those cases concerned with a requirement of notice and hearing before what is effectively a final judgment in the case (*Constantineau* and *Stanley*) are obviously inapplicable, because the filing of an information does not represent a final disposition of either the matter of pre-trial detention (considered in the bail proceeding) or the ultimate question of guilt or innocence (resolved at trial). Those cases involving the constitutional validity of temporary deprivations in advance of final judgment (*Sniadach, Goldberg, Bell* and *Fuentes*) were decided in wholly different contexts and involved individualized consideration of the kind of process that is due before a particular deprivation of property takes place. Due process does not always require that notice and opportunity for hearing precede

[11] *Fuentes* v. *Shevin*, 407 U.S. 67; *Stanley* v. *Illinois*, 405 U.S. 645; *Bell* v. *Burson*, 402 U.S. 535; *Wisconsin* v. *Constantineau*, 400 U.S. 433; *Goldberg* v. *Kelly*, 397 U.S. 254; *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337.

the taking of property or liberty; indeed, certain decisions may be made *ex parte* and by non-judicial or administrative officers. See, *e.g.*, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, No. 73-157, decided May 15, 1974; *Michell* v. *W. T. Grant Co.*, No. 72-6160, decided May 13, 1974. In the criminal justice system, while an arrest may be made without a warrant by a police officer, the prosecutor then carefully reviews the case brought by the police (cf. *Calero-Toledo* v. *Pearson Yacht Leasing Co., supra*) and determines whether there is evidence sufficient to file a formal charge. Moreover, the bail hearing provides the opportunity for an informal judicial examination of the case and for the restoration of at least conditional liberty pending a final determination of the case on its merits. No comparable procedure for review and protection of the interests at stake existed in any of the cases relied upon by the court of appeals and by respondents.

Finally, our analysis of the requirements of due process necessarily considers the costs to the criminal justice system of requiring preliminary hearings with live witnesses in every case. Such a requirement will divert already overburdened judges, prosecutors, defense lawyers, court personnel and court facilities from the task of speedily disposing of cases. Moreover, the very real problem of securing the cooperation of lay witnesses will be exacerbated by procedures requiring them to spend additional time waiting to testify and actually testifying in court; and law enforcement officers, called to court for such preliminary matters, will be taken away from the active prevention and investigation of crime.

ARGUMENT

In the first part of our argument (pp. 22–47, *infra*), we contend that in criminal cases that may constitutionally be commenced by an information filed by the prosecutor, due process does not require an opportunity for pre-trial review of the charging decision by a judicial officer. We will show that both historically and in terms of its present function, a preliminary hearing is inappropriate once formal criminal charges have been preferred by way of information. Moreover, conferral of the charging power on the prosecutor, free of pre-trial judicial supervision, is neither unfair nor inconsistent with recent decisions of this Court. Finally, we urge that any requirement for preliminary hearings that the Court may recognize, can constitutionally and should appropriately be confined to felony cases.

Our argument in Part II, *infra*, pp. 48–53, is premised on the fact that the court of appeals was concerned not about the right of the prosecutor to prefer charges by information, but about the fact of pre-trial incarceration without the opportunity for a judicial determination whether there is evidence sufficient to support the charge. We contend, however, that due process is afforded when relevant matters concerning the strength of the prosecution's case can be considered in the course of the bail proceedings. Pre-trial release (but not dismissal of the charges) may be appropriate in a weak case.

Assuming, *arguendo*, that the Court concludes that due process requires an independent probable cause

determination by a judicial officer before trial, we contend in Part III, *infra*, pp. 53–67, that other means than the preliminary hearing are permissible to satisfy that requirement. Due process can be afforded by an informal judicial procedure such as that provided by the bail hearing or in reviewing affidavits in support of warrants. Recent due process decisions of this Court do not require a more formal procedure in the nature of a preliminary hearing to determine probable cause. Finally, we suggest that the costs to the criminal justice system of requiring probable cause determination by formal preliminary hearing significantly outweigh the benefits which would accrue.

I

IN CRIMINAL CASES THAT MAY CONSTITUTIONALLY BE COMMENCED BY AN INFORMATION FILED BY THE PROSECUTOR, DUE PROCESS DOES NOT REQUIRE AN OPPORTUNITY FOR PRE-TRIAL REVIEW OF THE CHARGING DECISION BY A JUDICIAL OFFICER

We begin our analysis by showing that the Constitution does not require pre-trial judicial review of the sufficiency of the evidence to support a prosecutor's unilateral determination, solemnized in a formal information filed with the court, that an individual should be required to stand trial to answer criminal charges. While the court of appeals focused its concern not on the onus of trial, but on the deprivation of liberty entailed in pre-trial detention, the nature of the remedy selected by the court to eliminate the risk of unjustified detention (a preliminary hearing) implicitly undermines, in our view, the traditional premise of our criminal justice system that the charg-

ing decision in certain categories of cases (limited to misdemeanors and petty offenses in the federal system) resides with the prosecutor and is not subject to pre-trial judicial review.[12] Having isolated and considered the respective roles of court and prosecutor in the charging decision, including the function of the preliminary hearing, the ground is then cleared to consider (as we do in Part II, *infra*) the problem of pre-trial custody and the nature of the remedies appropriate to minimize the risk of unjustified pre-trial detention.

A. HISTORICALLY AND IN TERMS OF ITS PRESENT FUNCTION, A PRELIMINARY HEARING IS INAPPROPRIATE ONCE FORMAL CRIMINAL CHARGES HAVE BEEN PREFERRED

It has long been established that due process does not require all prosecutions to be initiated by grand jury indictment and that, where authorized by law, an information filed by the prosecutor is a constitutionally permissible method by which to bring a criminal charge. *Hurtado* v. *California,* 110 U.S. 516.[13] More-

[12] Except, of course, that an information, like an indictment, is subject to pre-trial attack on grounds of facial invalidity or through the establishment of certain types of defenses—*e.g.*, statute of limitations, double jeopardy—not entailing an assessment of "probable cause." The availability of this kind of challenge to a criminal charge is not at issue here, nor is the question of the relief available for retaliatory or discriminatory prosecutions.

[13] See also *McNulty* v. *California*, 149 U.S. 645, 648; *Hodgson* v. *Vermont*, 168 U.S. 262, 272; *Bollen* v. *Nebraska*, 176 U.S. 83; *Maxwell* v. *Dow*, 176 U.S. 581; *Dowdell* v. *United States*, 221 U.S. 325, 332; *United States* v. *Pickard*, 207 F.2d 472 (C.A. 9); *Rivera* v. *Government of the Virgin Islands*, 375 F.2d 988 (C.A. 3); *United States* v. *Funk*, 412 F.2d 452, 454–455 (C.A. 8); *Buchannon* v. *Wainwright*, 474 F.2d 1006 (C.A. 5).

over, under current federal practice, "[a]n information may be filed without leave of court." Fed. R. Crim. P. 7(a)." Equally accepted hitherto is the proposition that "an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Costello* v. *United States,* 350 U.S. 359, 363. See also *Lawn* v. *United States,* 355 U.S. 339, 349; *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594, 599. Finally, this Court has stated on numerous occasions that there is no constitutional requirement of a preliminary hearing prior to the initiation of formal criminal charges, whether by indictment (*Goldsby* v. *United States,* 160 U.S. 70, 73; *United States ex rel. Hughes* v. *Gault,* 271 U.S. 142, 149; *United States ex rel. Kassin* v. *Mulligan,* 295 U.S. 396, 400), or by information, where the prosecutor is authorized by law to proceed in that manner. *Lem Woon* v. *Oregon,* 229 U.S. 586; *Ocampo* v. *United States,* 234 U.S. 91; *Beck* v. *Washington,* 369 U.S. 541.[15]

[14] This was not always so. See *Albrecht* v. *United States*, 273 U.S. 1. Under the *Albrecht* decision, however, leave of court would be freely granted even though the information was not verified or accompanied by affidavits, for the oath of office of the United States Attorney was deemed "sufficient to give verity to the allegations of the information." *Albrecht* v. *United States*, *supra*, 273 U.S. at 6.

[15] Every circuit court of appeals that has considered the question of whether there is a constitutional right to a preliminary hearing, including the Fifth Circuit prior to this case, has concluded that there is no such right See *Sciortino* v. *Zampano*, 385 F.2d 132, 134 (C.A. 2), certiorari denied, 390 U.S. 906 (indictment); *Government of the Virgin Islands* v. *Bolones*, 427 F.2d 1135, 1136 (C.A. 3) (information); *Barber* v. *United States*, 142 F.2d 805, 807

Respondents argue, however, that while a preliminary hearing may not be required prior to the filing of the formal criminal charge, due process of law requires a determination of probable cause by a neutral and detached magistrate subsequent to the filing of an information. They do not urge that such a hearing is required when the prosecutor proceeds by grand jury indictment (Respondents' Brief, p. 2), although both this Court and Congress have concluded that the indictment and the information are entitled to equal dignity as charging documents (see, *e.g., Costello* v. *United States, supra*),[16] and that no preliminary

(C.A. 4), certiorari denied, 322 U.S. 741 (indictment); *Buchannon* v. *Wainwright*, 474 F.2d 1006 (C.A. 5) (information); *United States* v. *Smith*, 343 F.2d 847, 850 (C.A. 6), certiorari denied, 382 U.S 824 (indictment); *United States* v. *Funk*, 412 F.2d 452, 455–456 (C.A. 8) (information); *United States* v. *Pickard*, 207 F.2d 472, 474 (C.A. 9) (information); *Pearce* v. *Cox*, 354 F.2d 884, 891 (C.A. 10), certiorari denied sub nom. *Charlton* v. *Cox*, 384 U.S. 976 (information); *Crump* v. *Anderson*, 352 F.2d 649, 651–652 (C.A.D.C.) (indictment and information); but see *Brown* v. *Fauntleroy*, 442 F.2d 838 (C.A.D.C.).

State courts that have considered the matter also have concluded that there is no constitutional right to a preliminary hearing. See, *e.g., Washington* v. *State*, 213 Ark. 218, 210 S.W. 2d 307; *State* v. *Mazzadra*, 28 Conn. Super. 252, 258 A. 2d 310; *Smith* v. *O'Brien*, 109 N.H. 317, 251 A. 2d 323; *State* v. *Singleton*, 253 La. 18, 215 So. 2d 838; *State* v. *Jackson*, 43 N.J. 148, 203 A. 2d 1; *Commonwealth* v. *O'Brien*, 181 Pa. Super. 382, 124 A. 2d 666; *State ex rel. Leighton* v. *Henderson*, 448 S.W. 2d 82 (Tenn. Crim. App.); *Benson* v. *Commonwealth*, 190 Va. 744, 58 S.E. 2d 312; *State* v. *Ollison*, 68 Wash. 2d 65, 411 P. 2d 419, certiorari denied *sub nom. Wallace* v. *Washington*, 385 U.S. 874; *Commonwealth* v. *Britt*, 285 N.E. 2d 780 (Mass.); *Shields* v. *State*, 126 Ga. App. 544, 191 S.E. 2d 448. See also *Freeman* v. *Smith*, 301 A. 2d 217 (D.C. App.).

[16] In *Ewing* v. *Mytinger & Casselberry, supra*, 339 U.S. at 599, it was said by way of example: "The impact of the initiation of judicial proceedings is often serious. Take the case of the grand jury. It returns an indictment against a man without a hearing. It does not determine his guilt; it only determines whether there is probable cause to believe he is guilty. But that determination is conclusive on the issue of probable cause. As a result the defendant can be arrested and held for trial. * * * The impact of an indictment is on the reputation or liberty of a man. The same is true where a prosecutor files an information charging violations of the law."

examination is required "if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination." Fed. R. Crim. P. 5(c).[17] See also 18 U.S.C. 3060(c).

The rationale underlying the provisions in the Federal Magistrates Act and the Federal Rules that cut off the right to a preliminary hearing after the filing of the formal charge (indictment or information) is found in the history and purpose of the preliminary hearing.[18] In England, at a time when there was neither a police force nor a public prosecutor, the

[17] While this provision was added to the Federal Rules of Criminal Procedure in 1972 in order to conform the Rules with the Federal Magistrates Act of 1968, 82 Stat. 1107, it is consistent with prior law. *See Crump* v. *Anderson*, 352 F.2d at 656 *supra*; *Barrett* v. *United States*, 270 F.2d 772 (C.A. 8).

[18] For an excellent discussion of the history of the preliminary examination, see Staff Memorandum, *Historical Analysis of the Preliminary Hearings*, Hearings before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, on S. 3475 and S. 945 (Federal Magistrates Act), 89th Cong., 2d Sess. and 90th Cong., 1st Sess. 268–271 (hereafter referred to as "Staff Memorandum"). See also Orfield, *Criminal Procedure from Arrest to Trial*, ch. 2, pp. 49–100 (1947); Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 Mich. L. Rev. 1361, 1365–1370 (1969).